General Teamsters Local Union No. 174, International Brotherhood of Teamsters, AFL–CIO *and* Airborne Express, Inc. and ABX Air, Inc., Party-in-Interest. Cases 19–CD–483 and 19–CD–484.

September 12, 2003

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS BATTISTA, SCHAUMBER, AND WALSH

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). Airborne Express, Inc. (Airborne) filed charges on February 22, 2002, and June 11, 2002, alleging that Respondent, General Teamsters Local Union No. 174 (Local 174 or the Union) violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing Airborne to assign certain work to Airborne employees it represents rather than to permit ABX Air, Inc. (ABX) to subcontract the work to employees of Wick's Air Freight who are also represented by Local 174. The two cases were consolidated for a hearing held from August 13 to August 15, 2002, before Hearing Officer Dianne Todd.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

Airborne, a corporation with a place of business in Seattle, Washington, operates a national and international package pickup and delivery service. During the 12-month period before the hearing, Airborne, in conducting its business in the State of Washington, derived gross revenues in excess of $50,000 from customers for transporting items from the State of Washington to points outside the State or vice versa. The parties stipulated, and we find, that Airborne is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Local 174 is a labor organization within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background

Airborne and ABX are subsidiaries of Airborne, Inc. Airborne provides local package pick up and delivery services across the country (i.e., similar to its competitors UPS and Federal Express). ABX, headquartered in Wilmington, Ohio, is an air carrier subject to Railway Labor Act jurisdiction. *ABX Air, Inc.*, 25 NMB 274 (1998).[1] For small volume customers, Airborne employees pick up packages at the customer site, using small delivery vans and trucks up to 26 feet in length, and take them to a local Airborne station (also known as a "terminal"). After further processing by Airborne employees, ABX then transports the freight to ABX regional sort facilities (also known as "hubs") or to an Airborne terminal in another area, either by using its own aircraft or by subcontracting the work to carriers who use large tractors and trailers (semitrailers). ABX employees at the hubs then sort and reload shipments into containers before sending them to their destination regions.

In April 2001[2], Airborne introduced its new service of transporting ground product (freight that does not have to be delivered "next day" or "second day" as does its "core product"). Because ground product does not have to be delivered quickly and must be transported using the most economical method due to its low price, it is generally transported by truck. Thus, Airborne began using a process called "line haul" transportation, which is distinguished from the local pick up and delivery described above. The line haul process involves an ABX-contracted carrier delivering a 53-foot trailer to the customer, where it is filled by the customer's employees, hooked up to a tractor, and driven to the closest ABX hub.[3] ABX contracts out all line haul work, including the customer-to-hub transportation, because it owns no semi-trailers and employs no semitrailer drivers.[4]

Beginning in November, Airborne succeeded UPS in the performance of line haul ground delivery service for Cutter & Buck (Airborne's new ground service customer). During the month-long period of transition from UPS to Airborne, Cutter & Buck planned to start slowly, with Airborne drivers transporting small volumes of freight to a station until business reached about 1,300 shipments per night, at which time the direct line haul transportation of freight between Cutter & Buck and the Western Washington Hub (WWH)[5] (performed by ABX

[1] The Union argues that Airborne and ABX are a single-integrated operation, relying on several cases that deal with the single-employer issue under a different subsection of the Act. We find it unnecessary to address this issue, as it does not affect the outcome of this case.

[2] All dates are in 2001 unless otherwise stated.

[3] Airborne used this "customer-to-hub" process at least on an occasional basis before introducing its ground delivery service, and since then it has used the customer-to-hub process on a regular basis.

[4] ABX also uses the term "line haul" to refer to the trucking of freight from Airborne stations to ABX regional hubs and back.

[5] An increase in freight volume prompted ABX to establish this hub in November. The WWH is now located in Chehalis, Washington, outside of the geographic area covered by Airborne employees.

subcontractors) would begin.[6] Airborne Regional Field Services Manager Kevin Connelly explained this transition process to union representatives in discussions before the work began. Airborne employees transported small volumes of freight to Airborne's Kent station from November 9 to December 9.

Since December 9, ABX has subcontracted line haul work from Cutter and Buck to employees of Wick's Air Freight. Wick's employees transport large volume semitrailers between Cutter & Buck and WWH, dropping off an empty trailer at Cutter & Buck's facility in the morning and picking it up in the evening after Cutter & Buck employees have loaded it. Wick's exclusively performs line haul of freight by semitrailer and has performed other line haul work for ABX for the past 6 years.

Local 174 represents Airborne employees and Wick's employees in separate bargaining units. It disputed Wick's employees' performance of the Cutter & Buck work. The Union referred to its collective-bargaining agreement with Airborne, which states, inter alia, "2.03 Employer agrees that work now performed by or hereafter assigned to members of the bargaining unit will not subsequently be performed by non-unit employees." This dispute led to union grievances, which were discussed with Airborne in several meetings, including a "Board of Adjustment" meeting between representatives of both parties, as well as mediation pursuant to the collective-bargaining agreement. In trying to resolve the dispute, Airborne and the Union exchanged several letters between November 2001 and June 2002, including several notices by the Union of its intent to begin economic action against Airborne if it did not assign the work in dispute to Airborne employees represented by Local 174.

Airborne proposed arbitration of the dispute in December and the Union rejected the proposal. Airborne renewed the proposal to arbitrate in January 2002, agreeing to waive any defense of untimeliness. After hearing no response from the Union for over 2 weeks, it informed the Union that it would not waive its claim of untimeliness. Airborne then filed unfair labor practice charges against the Union alleging violations of Section 8(b)(4)(D).

B. Work in Dispute

The parties stipulated that the work in dispute consists of ground transportation of freight from Cutter & Buck to an ABX hub.

[6] This transition was also a test period to determine how Cutter & Buck's system integrated with Airborne's internal information transfer and tracking system, and to resolve any issues with the system integration, as well as to give notice of the transition to UPS.

C. Contentions of the Parties

Union's Argument

The Union moves to quash the notice of hearing, asserting that the dispute here involves a work preservation claim on behalf of Airborne employees and does not present a jurisdictional dispute under Section 10(k) of the Act. See *Teamsters Local 107 (Safeway Stores)*, 134 NLRB 1320 (1961). The Union also asserts that this case does not involve two separate groups of employees with competing claims to the work in dispute. The Union further argues that it unequivocally disclaimed the work on behalf of Wick's employees. Finally, the Union maintains there is an agreed upon voluntary method of adjustment for this dispute.

Alternatively, the Union argues that, if the Board reaches the merits of assigning the work in dispute, it should award the work to Airborne employees represented by Local 174 based on the factors of its collective-bargaining agreement with Airborne, relative skills and experience, industry and area practice, and Wick's involvement in bankruptcy proceedings.[7]

Airborne's Argument

Airborne argues there is reasonable cause to believe that Local 174 violated Section 8(b)(4)(D) of the Act by coercive threats in support of an attempt to expand its jurisdiction to include work that Airborne employees have not previously performed. Airborne also argues that competing claims exist between the Airborne employee group represented by Local 174 and the Wick's employee group also represented by Local 174, the Union has not unequivocally disclaimed the work on behalf of the latter group, and there is no method for voluntary adjustment of the dispute.

Finally, Airborne argues that the work in dispute should be awarded to Wick's employees based on the factors of employer preference, economy and efficiency of operations, relative skills and experience, employer past practice, industry and area practice, no loss of jobs, safety, certifications and collective-bargaining agreements, and joint committee awards. Airborne seeks a broad award encompassing the work of picking up and transporting ground shipments from any Airborne customer in the Puget Sound Region to an ABX hub, rather

[7] We grant the Charging Party's motion to take administrative notice of the bankruptcy court's orders and to augment the record with these orders, which issued subsequent to the hearing in this case. The United States Bankruptcy Court for the Western District of Washington issued two orders, denying the Western Conference of Teamsters Pension Trust Fund's motion to convert the Chapter 11 reorganization proceeding to a Chapter 7 liquidation proceeding, and confirming Wick's plan to reorganize, respectively.

than limiting the award to transportation between Cutter & Buck and an ABX hub.

D. Applicability of the Statute

It is well settled that the standard in a Section 10(k) proceeding is whether there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. This standard requires finding that there is reasonable cause to believe a party has used proscribed means to enforce its claim to the work in dispute, and that there are competing claims to the disputed work among rival groups of employees. In addition, the Board will not proceed under Section 10(k) if there is an agreed-upon method for voluntary adjustment of the dispute. As discussed below, we find the prerequisites for asserting jurisdiction under Section 10(k) are met in this case.[8]

1. The Union's work preservation claim

As indicated, the Union contends its claim on behalf of Airborne employees raises a work preservation dispute rather than a jurisdictional dispute. In *Teamsters Local 107 (Safeway Stores)*, 134 NLRB 1320, 1321 (1961), the Board found that a valid work preservation dispute, involving an attempt to preserve or recapture work traditionally performed by an employee group, was not a jurisdictional dispute under Section 8(b)(4)(D) and 10(k). In that case, Safeway discharged employees represented by one union local, and subsequently reassigned the work they had performed to employees represented by other union locals. The reassignment was in direct violation of the collective-bargaining agreement between the former union and Safeway. The former union picketed in an effort to preserve the contractual work its members traditionally performed. An unfair labor practice charge was filed, initiating a 10(k) proceeding. The Board concluded that Section 10(k) should not apply because the employer unilaterally created the dispute by transferring the work away from the only group previously claiming and performing it under a collective-bargaining agreement. Id. at 1323.

In subsequent cases, the Board has not applied the work preservation doctrine of *Safeway* where the union's objective was acquisition of work not historically performed by the claiming group of employees. See, e.g., *Teamsters Local 107 (Reber-Friel Co.)*, 336 NLRB 518 (2001) (union members only performed work in question on a few occasions); *Stage Employees IATSE Local 39 (Shepard Exposition Services)*, 337 NLRB No. 119 (2002) (union only performed work on three occasions); *Longshoremen ILWU Local 14 (Sierra Pacific Industries)*, 314 NLRB 834 (1994) (although employees performed same work at another facility and different work at employer's facility, they never performed same work at employer's facility). The Board has also declined to apply *Safeway* "where work preservation claims were based entirely on a contractual claim without the employees' having previously performed the work." *Reber-Friel*, supra, 336 NLRB 518, 521 (2001). See also *Redstone Workers Assn.*, 241 NLRB 945, 946 (1979).

In light of this precedent, we look to whether Airborne employees claiming the work in dispute have traditionally performed this work. Airborne employees have never performed line haul transportation of large volumes of freight by semitrailer from a customer to an ABX hub. At most, they transported small volumes of freight to a local Airborne station for one month. Airborne informed the Union this was only a temporary arrangement limited to the transitional period between UPS's service and Airborne's full service through the subcontract with Wick's.[9]

Moreover, in the absence of evidence that Airborne employees have historically performed the work in dispute, we find Local 174's reliance on the Airborne collective-bargaining agreement's work preservation clause unavailing, as in *Starks Construction Co.*, supra. Accordingly, we find reasonable cause to believe the Union acted in furtherance of a proscribed work acquisition objective, creating a jurisdictional dispute under Section 10(k).

2. Competing claims from two groups of employees

The Board must also determine that two different groups of employees have competing claims to the work to find a jurisdictional dispute. The fact pattern here is unusual because the two groups of employees are in separate bargaining units represented by the same local union but working for two different employers. However, the Board has held that employees qualify as different competing groups under Section 8(b)(4)(D) in these circumstances. *Electrical Workers Local 98 (Honeywell, Inc.)*, 332 NLRB 526, 527 (2000). The Board has also rejected the argument that local truckdrivers and over-the-road drivers are in the same trade, craft, or class (truckdrivers). *Truckdrivers & Chauffeurs Local 705 (Direct Transit)*, 92 NLRB 1715, 1720 (1951). Finally, the Board has held that employees demonstrate a competing claim to disputed work by performing it. *Plumbers Local 195 (Gulf Oil)*, 275 NLRB 484, 485 fn.

[8] It is undisputed that the Union engaged in coercive acts within the meaning of Sec. 8(b)(4) by threatening to picket and strike if Airborne employees were not given the work.

[9] Likewise, evidence that Airborne employees transported aircraft parts by semitrailer over 22 years ago is far too remote and isolated to support finding a history of performing the work in dispute within the meaning of *Safeway*.

7 (1985) (internal citation omitted). Thus, we find Airborne's local truckdrivers represented by Local 174 and Wick's line haul truckdrivers represented by Local 174 are competing groups of employees.

3. No valid disclaimer

The Union asserts that no competing claims exist because it disclaimed the work in dispute on behalf of Wick's employees. The Union's business agent told Terry Wick, owner of Wick's Airfreight, at a dinner meeting, that the work belongs to Airborne employees rather than Wick's employees. The Union's attorney also sent a purported disclaimer of the work in dispute to the Regional Director during the investigation of the charge in this case. However, Wick's employees continued to perform the work. Moreover, as Airborne points out, the Union's purported disclaimer does not appear to have been communicated at all to Airborne or to Wick's employees, much less communicated clearly and unequivocally.[10] Furthermore, there is no evidence that any Wick's employees refused to do the work or indicated that they were only performing the work because of some threat of discipline. In these circumstances, where there is conduct that is inconsistent with the disclaimer, and the disclaimer itself is not clear and unambiguous, there is no valid disclaimer.

4. No voluntary method for adjustment of dispute

We find the facts do not establish that the parties have agreed to a voluntary method for adjustment of this dispute. In *Longshoremen ILWU Local 6 (Golden Grain)*, 275 NLRB 1128, 1130 (1985), the Board found no such voluntary method where the Employer had separate contracts with both unions involved, both of which contained arbitration provisions, but neither contract provided for tripartite arbitration. The Board found that those circumstances did not provide "a method for binding all parties in a single proceeding." Id., quoting *San Diego Stereotypers Union No. 82*, 201 NLRB 893, 895 (1973).

Union witnesses admitted at the hearing that Airborne had not agreed to the Union's belated proposal on the first morning of the 10(k) hearing to arbitrate the dispute under its contract with Airborne.[11] Even assuming this contract provides a means for resolving the dispute between Airborne and Local 174, there is no basis for binding Wick's to this procedure. Accordingly, we find there is no voluntary means of adjustment binding on all parties to the jurisdictional dispute.

In sum, we find that there is reasonable cause to believe that all of the elements of Section 8(b)(4)(D) have been shown and that there is no agreed-upon method for resolving the jurisdictional dispute.

E. Decision and Analysis

The grant of authority in Section 10(k) for the Board to "hear and determine" jurisdictional disputes requires the Board to make an affirmative award of the disputed work to one of the groups of employees involved in the dispute. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 579 (1961). While the Act does not set out the standards the Board is to apply in making this determination, the Supreme Court explained that "[e]xperience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board." Id. at 583. Consistent with the Court's opinion, the Board announced in *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402, 1410–1411 (1962), that in making the determination that the Supreme Court found was required by Section 10(k), it would consider "all relevant factors," and that its determination in a jurisdictional dispute would be an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case.

We have considered the following factors, which we find relevant in the context of the current dispute and, for the reasons set forth more fully below, we conclude that Wick's employees represented by Local 174 are entitled to perform the work in dispute. In making this determination, we emphasize that we are awarding the work to Wick's employees represented by Local 174, not to that Union or its members.

1. Certifications and collective-bargaining agreements

Local 174 has separate collective-bargaining agreements with Airborne and Wick's. Neither agreement specifically covers the work in dispute. Accordingly, we find this factor does not favor awarding the work to either group of employees.

2. Employer preference

The Board finds the preference of the subcontractor in control of the work, rather than that of the general contractor, to be controlling. *Laborers Local 646 (General Refrigeration)*, 268 NLRB 472, 473 (1983) (citing *Operating Engineers Local 139 (McWad, Inc.)*, 262 NLRB 1300 (1982)). Wick's prefers that its employees continue to perform the work. We find that this factor favors awarding the work to Wick's employees.

[10] The disclaimer must be "clear, unequivocal, and unqualified." *Operating Engineers Local 150 (Austin Co.)*, 296 NLRB 938, 939 (1989).

[11] Airborne argues that its offer to arbitrate the dispute had lapsed, and the Union's "acceptance" of the offer 7 months later at the 10(k) hearing was at most a counteroffer to arbitrate, which Airborne did not accept.

3. Economy and efficiency of operations

According to the testimony of Airborne's regional field services manager Kevin Connelly and Director of Field Services Support Robert Severini, Airborne has no semitrailers in the Seattle metro area, and it is not set up operationally to handle any line haul freight in the Seattle market. Airborne would require a large capital investment and additional staffing and training to perform the work.[12] The evidence does not show that Airborne drivers are qualified to drive semi-trailers, and in any event the bargaining unit has not done so for more than 20 years. Accordingly, we find that this factor weighs heavily in favor of the current assignment of the work in dispute to Wick's employees represented by Local 174.

4. Relative skills and experience

All Wick's employees have a Class A commercial driver's license (CDL), which is required to drive a tractor-trailer. Airborne employees are not required to maintain this license. Union representative Anthony Murrietta named four Airborne drivers who had once shown him their Class A licenses or told him that they had Class A licenses. Some Airborne employees drove a semitrailer during a single period in the late 1970's, when Airborne used it to transport large aircraft parts between commercial airlines and Boeing plants; however, Airborne employees have not transported freight by semitrailer since that time, nor have Airborne employees ever transported freight by semitrailer to an ABX hub. It appears that few, if any Airborne employees have any recent experience doing so. In contrast, Wick's employees regularly drive semitrailers and have the required licenses and endorsements. Thus, we find that this factor favors awarding the work to Wick's employees represented by Local 174.

5. Industry and area practice

With respect to industry practice, Airborne emphasizes that its major competitors, UPS and Federal Express, handle freight in the same manner as Airborne and ABX. UPS and Federal Express distinguish between line haul service and local pick up and delivery, and they use customer to hub transportation for large volumes instead of routing freight through stations as with small volumes. However, the Union points to evidence that UPS uses its own employees to perform the customer to hub shipments. Area practice involves the same considerations; the evidence shows that UPS follows the aforementioned procedure in the Seattle-Tacoma area. We find this factor does not favor awarding the work to either group of employees.

6. Job loss

There is no evidence that any Airborne employees would lose work or be laid off if the work in dispute is not assigned to them. On the other hand, the record indicates several Wick's employees would lose their jobs if Wick's did not retain the subcontract for the work in dispute. In fact, in a letter to Local 174 Business Agent Tom Mann dated April 2, 2002, Terry Wick lists retention of the Airborne work as "essential to our survival." We find this factor weighs in favor of assigning the work to employees of Wick's.[13]

7. Other factors

Airborne mentions safety (referring to a study showing some correlation between safety and driver experience, among other factors) and joint committee awards involving Airborne and other Teamsters unions covered by the National Master Freight Agreement (to which Local 174 is not a party) as other factors in favor of awarding the work to Wick's employees. The safety study, even if it had been more conclusive as to the correlation between safety and driver experience, is of little value in the absence of evidence regarding individual employees' driving histories. The joint committee awards are irrelevant because Local 174 is not a party to the National Master Freight Agreement. We find neither of these factors is significant to the determination of this dispute.

CONCLUSION

For the foregoing reasons, we conclude that Wick's employees represented by Local 174 are entitled to perform the work in dispute. We reach this conclusion relying on the factors of employer preference, economy and efficiency of operations, relative skills and experience, and avoidance of loss of jobs.

F. Scope of the Award

Airborne seeks a broad award that encompasses the work of picking up and transporting ground shipments from any Airborne customer in the Puget Sound Region to an ABX hub, rather than limiting the award to transportation between Cutter & Buck and an ABX hub. Airborne claims that the dispute is likely to recur and the Union has demonstrated a proclivity to use proscribed

[12] Moreover, if Airborne drivers were to transport the freight through the terminal system rather than directly to a hub, this additional step could jeopardize Cutter & Buck's 4-day service requirement.

[13] The Union characterizes Wick's as "financially unstable," citing Wick's bankruptcy, its motion to convert from Chapter 11 to Chapter 7 (which has since been denied), and its attempt in bankruptcy court to divest itself of the Teamsters Local 174 contract. However, we do not find this evidence to be relevant in determining which group of employees should perform the work in dispute.

means to obtain similar work. We find no merit in this contention.

There are two requirements for a broad, area-wide award. First, there must be evidence that the disputed work has been a continuous source of controversy in the relevant geographic area and that similar disputes may recur. Second, there must be evidence demonstrating that the charged party has a proclivity to engage in unlawful conduct to obtain similar work. *Bricklayers (Sesco, Inc.)*, 303 NLRB 401, 403 (1991).

Nothing in the record suggests any history of similar work disputes in the past. Furthermore, there is no evidence demonstrating that Local 174 has a proclivity to engage in unlawful conduct to force the reassignment of work. Accordingly, we shall limit the present determination to the particular controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Wick's Airfreight represented by General Teamsters Local Union No. 174, International Brotherhood of Teamsters, AFL–CIO, are entitled to perform the work of ground transportation of freight from Cutter & Buck to an ABX Air, Inc. regional hub.

2. General Teamsters Local Union No. 174, International Brotherhood of Teamsters, AFL–CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Airborne Express, Inc. to assign the disputed work to employees represented by it.

3. Within 14 days from this date, General Teamsters Local Union No. 174, International Brotherhood of Teamsters, AFL–CIO shall notify the Regional Director for Region 19 in writing whether it will refrain from forcing Airborne Express, Inc., by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

Dated, Washington, D.C. September 12, 2003

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Robert J. Battista, Chairman

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Peter C. Schaumber, Member

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Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD